UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

CINDY L. TAYLOR v. DEPARTMENT OF THE NAVY	Docket No. SF075299051-80-70

MEMORANDUM OPINION AND ORDER

This matter comes before the Merit Systems Protection Board, hereinafter the "Board", pursuant to the authority of 5 U.S.C. 7701(e)(1)(A) and 5 CFR 1201.115 on the petition of Cindy L. Taylor who requested that the Board review the initial decision of the presiding official on her appeal issued on July 31, 1979. The petitioner, a non-appropriated fund employee, was terminated from employment with the Resale Distribution Center, Naval Supply Center, Department of the Navy, Oakland, California. She appealed to the San Francisco Field Office of the Board. The presiding official dismissed the appeal upon a finding that the appellant had no statutory or regulatory right of appeal to the Board because non-appropriated fund employees: (1) are not covered by the definition of employee set forth in 5 U.S.C. 7511; (2) are not covered by 5 CFR 752.401; (3) are specifically excluded as employees for the purpose of laws administered by the Office of Personnel Management (OPM) (5 U.S.C. 2105(c)(1); and (4) are not covered by 5 U.S.C. 7121(d) and (e).

In a timely petition for review, submitted by the petitioner's representative, the American Federation of Government Employees (AFGE), under date of August 31, 1979, the petitioner contends that the initial decision was based upon an erroneous interpretation of 5 U.S.C. 7121(d) and (e) and 5 CFR 1201.3. The petitioner noted that the question of the right of appeal of non-appropriated fund employees has been a recurring one and suggests that certain amendments to title 5 of the United States Code wrought by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, (the Act), reflect a legislative intent to embrace NAF employees within the definition of "employee" under title 5 of the Code for purposes of appeal to the Board from certain adverse personnel actions taken against them by their employing activity.

In recognition of the impact of the initial decision in this case upon a large class of employees hitherto not protected by the appellate authority provided by law and Civil Service regulations to covered Federal employees, the Board has reviewed the relevant

statutory provisions of the Act and the legislative history to determine whether the Act, specifically or by legislative intent, extended appellate coverage to non-appropriated fund, NAF, employees.

In the case of *Bowen* v. *Culotta,* 294 F. Supp. 183 (D.C. Va. 1968), the Court defined a non-appropriated fund activity as one to which the government has initially provided funds to permit it to begin operations and the governmental loan is repaid out of the profits earned by the activity; the activity is thus created by the government with governmental funds for governmental personnel and is administered by governmental employees for use and benefits of the United States.

Prior to the passage of the Act, the appellate decisions of the Board's predecessor agency, the United States Civil Service Commission, consistently held that NAF employees were excluded by the provisions of 5 U.S.C. 2105 from the Commission's appellate authority. Those decisions had been tested in the Courts and upheld. *Keitz* v. *United States,* 168 Ct. Cl. 205 (1964). In the *Bowen* case, *supra,* the court held that although an NAF activity was an instrumentality of the United States, 5 U.S.C. 2105(c) did not allow a cause of action under civil service procedures.

5 U.S.C. 2105 defines employee for purposes of that title, except as modified by specific chapters or subchapters for purposes therein. 5 U.S.C. 2105(c) states "An employee paid from non-appropriated funds . . . is deemed *not* an employee for the purpose of (1) laws . . . administered by the Civil Service Commission." The sole change to this section by the Act was a technical or conforming change substituting Office of Personnel Management for Civil Service Commission.

The petitioner argues that appellate procedures under the Act are administered by the Board and not the Office of Personnel Management; therefore 5 U.S.C. 2105(c) is no longer applicable to the appellate process.

Although the Act extended authority to the Board to "prescribe such regulations as may be necessary for the performance of its functions" [5 U.S.C. 1205(g)], that authority cannot be construed as conferring upon the Board the authority to extend appellate coverage to employees who have not been provided a right of appeal by law, or Rule or Regulation of the Office of Personnel Management implementing a law. Significantly, the Act specifically vests authority in the Office of Personnel Management to prescribe regulations to carry out the purposes of those subchapters relating to adverse actions against employees except as it concerns any matter with respect to which the Board may prescribe regulations. [5 U.S.C. 4305, 7503(a), 7504, 7511(c), 7513(a), 7543(a) and elsewhere.] On the other hand, the Act specifically vests

authority in the Board to prescribe regulations to carry out the purposes of Chapter 77, captioned "Appeals". The purpose of Chapter 77 is to (1) establish by law administrative appellate procedures to be applied to appeals of employees from an action which is appealable to the Board under any law, rule, or regulation, and (2) provide a statutory right to obtain judicial review before an appropriate court to employees and applicants for employment who are adversely affected by a final order or decision of the Board on appeal.

The statutory provisions vesting authority to regulate in either the Office of Personnel Management or in the Board are clear and unambiguous. OPM has the responsibility to regulate as to employee coverage and as to the procedural requirements an agency must satisfy to conform with law in effecting adverse actions and other matters that are appealable to the Board. The Board, on the other hand, has the responsibility to promulgate implementing regulations concerning the appellate processing of appeals from actions that are appealable to the Board under law, rule or regulations. There is no provision in the Act that would authorize the Board to grant by regulation a right of appeal to employees who have not been granted a right of appeal by law, rule or regulation. Nor can the Board extend a right of appeal to employees of activities specifically precluded by law from such right as is the case under 5 USC 2105(c).

The functions of the Board are set out in 5 USC 1205. The Board's appellate function, provided therein, is to hear, adjudicate, or provide for hearing or adjudication, of all matters within its jurisdiction under title 5 of the Code, section 2023 of title 28, or any other law, rule or regulation.

The petitioner argues that the Act recognizes certain specified employees of NAF activities as employees for purposes of Title VII of the Act; therefore to achieve consistency between the statutory grievance procedures of the Act and the statutory provision for appeal to the Board, the definition of employee should be uniform.

In enacting Title VII of the Act, captioned "Labor-Management and Employee Relations", the Congress recognized the positive benefits that derive from statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them. For purposes of that Chapter, "agency" was defined to mean "an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title . . . " (see 5 USC 7103(a)(3)). However, the Board finds no evidence of an intent by Congress to redefine the definition of Executive Agency set forth in 5 U.S.C. 105, which was supplied to avoid the necessity for defining "Executive agency" each time it is

used in the title. It follows that any statutory redefinition of "agency" for purposes of a particular subchapter of the title was intended for application to the provisions of that subchapter alone.

The argument that the definition of employee for purpose of grievances under Chapter 71 of the Act should be uniform with the definition of employee for purposes of appeals under Chapter 77 of the Act has no support in the law. The former prescribes the rights of employees to organize and to engage in collective bargaining with respect to conditions of employment, including the right to grieve adverse actions within the agency under a negotiated grievance procedure. The latter prescribes the right of an employee, or applicant for employment, to appeal to the Board from any action which is appealable to the Board under any law, rule or regulation. Further, the express languge of 5 USC 7121(d) and (e) indicates that the provisions of those sections were not intended to apply to all employees covered under title VII of the Act. Section 7121(d) provides a right to aggrieved employees, who are affected by a prohibited personnel practice under section 2302(b)(1) of title 5 (prohibited discrimination) which also falls under the coverage of both a negotiated grievance procedure and a statutory procedure, to raise the matter under either procedure, but not both. Election to pursue the grievance procedure does not preclude the aggrieved employee from seeking review by the Board, pursuant to section 7702 of title 5, of the final decision under the negotiated grievance procedure in the case of any personnel action that could have been appealed to the Board. Section 7121(e) provides that in matters covered under sections 4303 (actions based on unacceptable performance) and 7512 (adverse personnel actions), and under a negotiated grievance procedure, the employee may raise the matter under the appellate procedure of section 7701 of title 5 or under the negotiated grievance procedure, but not both. Clearly, the provisions of sections 7121(d) and (e) are directed only to those employees who are covered by both the provisions of section 7121 and of either section 7701 or 7702. The provisions of 7121(d) or (e) do not extend coverage, expressly or impliedly, to employees who are not covered by the provisions of sections 7701 or 7702.

The fact that "agency" was redefined in section 7103(a)(3) of the Act to mean, for purposes of Chapter 71 of the Act, "... an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title ...)" manifests a consciousness by Congress of the statutory exclusion of NAF employees for purposes of laws administered by the then Civil Service Commission and, under the Act, of the Office of Personnel Management. Notwithstanding this awareness, similar changes in the definition of "agency" do not appear in the Act. It must be concluded, therefore, that Congress did not intend to remove the ex-

isting statutory exclusion of NAF employees expressed in 2105(c) for other purposes of the Act.

In summary the Board has found no support to the petitioner's contention that the initial decision in the instant case was based upon an erroneous interpretation of law, and concurs with the finding of the Presiding Official that section 2105(c) of title 5 of the United States Code precludes the Board from accepting jurisidiction of appeals from employees of nonappropriated fund activities.

Accordingly, the petition for review is DENIED. This is the final decision of the Board on this case.

The appellant is hereby notified of her right to seek judicial review of the Board's final decision in an appropriate circuit of the U.S. Court of Appeals or the Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., *March 20, 1980.*

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

San Francisco Regional Office

CINDY L. TAYLOR

v.

DEPARTMENT OF THE NAVY

Decision No. SF075299051

INTRODUCTION

By letter received June 4, 1979, Ms. Cindy L. Taylor appealed the decision of the Department of the Navy, Resale Distribution Center, Naval Supply Center, Oakland, California, terminating her employment as a Clerk-Typist, effective April 30, 1979.

Appellant claims she is entitled to appeal her termination to the Board under the provisions of 5 U.S.C. 7513(d) and 5 U.S.C. 7121(d) and (e). The termination is alleged to be procedurally defective and based upon prohibited discrimination (race). She seeks a return to duty without loss of pay.

The Resale Distribution Center acknowledges itself as a nonappropriated fund activity as defined in 5 U.S.C. 2105(c) and advises that appellant was an employee of that nonappropriate fund activity prior to termination.

Documents furnished by the activity disclose that appellant was hired October 30, 1978 as a regular, full-time probationary Clerk-Typist, AS 6907-3, at $3.56 per hour. She was issued a notice on April 30, 1979 terminating her the same date for failure to qualify during her probationary period.

Since this termination was commenced in the activity subsequent to January 10, 1979, it is governed by the provisions of the Civil Service Reform Act of 1978 (see Title IX, Section 902(b), 92 Stat. at 1224) if the appeal is within the Board's jurisdiction.

JURISDICTION

Appellant claims she is entitled to appeal under the provision of 5 U.S.C. 7513(d). Employees who are entitled to statutory appeal rights to this Board (from actions described in 5 U.S.C. 7512) are defined in 5 U.S.C. 7511, as follows:

> 7511. Definitions; application
>
> (a) For the purpose of this subchapter—
>
> (1) "employee" means—
>
> (A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and
>
> (B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions; . . .

Inasmuch as appellant does not fall within the above definitions (and was actually an employee of another personnel system operated by a nonappropriated fund activity) she is not covered by 5 U.S.C. 7511 and is not entitled to a statutory appeal to this Board as set forth in 5 U.S.C. 7513(d).

The Office of Personnel Management prescribes regulations to carry out the purposes of certain statutes. 5 CFR Part 752, sets forth those implementing regulations in regard to a removal, suspension for more than 14 days, a reduction in grade, a reduction in pay, or a furlough for 30 days or less (5 U.S.C. 7512).

5 CFR 752.401 identifies those employees covered by 5 U.S.C. 7512:

> (b) Employees Covered. The following employees are covered by this subpart:
>
> (1) An employee covered by the definition in 5 USC 7511(a)(1) including an employee of the Government Printing Office.

(2) An employee with a competitive status who occupies a position in Schedule B of Part 213 under a nontemporary appointment.

(c) Exclusions. This subpart does not apply to actions, employees, and agencies excluded by: 5 U.S.C. 7511(b); 5 U.S.C. 7512; and the following numbered items in the Master Lists of Exclusions in Subsections 210.101(d) and (e) of Part 210, 103, 106, 107, 109 through 116, and 200 through 203.

Simply, the Office of Personnel Management regulations have not given appellant a regulatory appeal right.

In addition, 5 U.S.C. 2105(c) sets forth the following:

(c) An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of—

(1) laws (other than subchapter IV of chapter 53 and sections 5550 and 7204 of this title) administered by the Office of Personnel Management; or

(2) subchapter I of chapter 81 and section 7902 of this title.

In other words, appellant is not covered by 5 CFR Part 752.

In regard to the contention that appellant has an appeal to the Board under 5 U.S.C. 7121(d) and (e), I find the following.

Certain nonappropriated fund instrumentalities are covered by Title VII of the Civil Service Reform Act of 1978 (see Subpart F, Labor Management Relations, Chapter 71, in Title 5, United States Code, Section 7101 and following). 5 U.S.C. 7103 defines "employee" and "agency," as follows:

(2) "employee" means an individual—

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include—

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the Agency for International Development, or the International Communication Agency; or

(v) any person who participates in a strike in violation of section 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Veterans' Administration), the Library of Congress, and the Government Printing Office, but does not include—

(A) the General Accounting Office;

(B) the Federal Bureau of Investigation;

(C) the General Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority; or

(G) the Federal Service Impasses Panel; . . . "

While granting that appellant could be in a bargaining unit covered by a negotiated grievance procedure which permitted certain appeals of removal actions, I find 5 U.S.C. Sections 7121(d) and (e) exclude any appeal to this Board of the instant termination matter.

5 U.S.C. 7121(d) and (e) state:

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title *in the case of any personnel action that could have been appealed to the Board,* or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint or discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under section 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedure of section 7701 of this title or under the negotiated grievance procedure, but not both. *Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both.* An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first. (Underlining furnished.)

The above citation means that the allegation of prohibited discrimination (race) gives no appeal right under Section 7121(d) because the termination action involved herein *could not have been appealed to the Board initially (5 U.S.C. 7512).* There is also no appeal right under Section 7121(e) because appellant is not covered by 5 U.S.C. 7512 and is actually in a personnel system that could have its own appellate procedures separate from the one granted certain employees in the competitive Federal civil service.

In summary, I find appellant has presented no matter within the Board's jurisdiction under 5 U.S.C. 7313(d) or 5 U.S.C. 7121(d) and (e). In view of the above, I make no finding regarding the timelines issue.

Appellant's forum is her former nonappropriated fund activity's administrative appellate procedure, if any, or the employing activity's discrimination complaint process governed by 5 CFR Part 713.

INITIAL DECISION

The appeal is dismissed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on September 3, 1979 unless a petition for review is filed with the Board within 35 calendar days of issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Protection Board. The petition shall set forth objections to this decision, supported

by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1717 H Street, N.W., Washington, D.C. 20419.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of OPM may file a request for review only if he/she is of the opinion that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office 5 USC 7701(e)(2).

Under 5 USC 7703(b)(1), the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board, provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

JOHN F. OLDFIELD,
Presiding Official.